(2)

No. 94-1880

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In The

Supreme Court of the United States

October Term, 1994

HOMESTEAD INSURANCE COMPANY,

Petitioner,

v.

DONALD ZOPPO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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RULES INVOLVED

Ohio Supreme Court Practice Rule II, Section 2 (A) provides, in pertinent part, as follows:

> (A) Perfection of Appeal
>
> (1) To perfect an appeal from a court of appeals to the Supreme Court, other than in a certified conflict case (which is addressed in S. Ct. Prac. R. IV), the appellant shall file a notice of appeal in the Supreme Court within 45 days from the entry of the judgment being appealed. If the appeal is a claimed appeal of right or a discretionary appeal, the appellant shall also file a memorandum in support of jurisdiction, in accordance with S. Ct. Prac. R. III, at the time the notice of appeal is filed.
>
> * * *
>
> (2) If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the later of the time prescribed by division (A)(1) of this section or 10 days after the first notice of appeal was filed.

Ohio Revised Code Section 2315.21 states, in pertinent part, as follows:

> (B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both the following apply:

(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages.

(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

(3) In a tort action, the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages.

STATEMENT OF THE CASE

Respondents Donald Zoppo, Windy's Restaurant, Inc. and Windy's, Inc. (two corporations wholly owned by Donald Zoppo) agree with Petitioner's Statement of the Case with these additions.

There was abundant evidence at trial that Homestead Insurance Company had unreasonably concluded that Mr. Zoppo had set the fire. Homestead's own investigator took a statement from a witness who stated that another individual had bragged about setting the fire (Petitioner's Appendix, p. 5a). Another witness confirmed that a group of men that Mr. Zoppo had ousted from the bar had burned the bar in retaliation (Pet. App. p. 6a). There was also evidence that one of the windows of the bar was broken before the fire to gain access to the bar and that video machines were broken into before the fire was started (Pet. App. p. 5a-6a).

Homestead's assertion that the jury awarded punitive damages only because it found "insult" is not supported by the record.

The jury answered the following special interrogatory as follows:

> Do you find that Donald Zoppo has proven by clear and convincing evidence that Homestead Insurance acted with malice, oppression, or insult during the handling of his insurance claim?
>
> Answer: Yes (X) No ( )

The word "insult" was also circled, but nobody ever asked the jury if this was the finding of all seven jurors who signed the answer to the interrogatory, the finding of the chairman who completed the interrogatory, or just a meaningless "doodle". Moreover, even if this was a finding of "insult" on the part of Homestead by the seven jurors who had signed the interrogatory answer, it could easily have been the finding of six jurors that Homestead

had also acted with "malice" or "oppression", but only "insult" was circled because all seven agreed on that finding. We will never know for sure because Homestead never requested the trial court to ask the jury about this issue before the jury was discharged. Since the jury's general verdict was consistent with the interrogatory answer, any possible error was waived by Homestead's failure to ask the trial court to inquire further of the jury.

After the Court of Appeals reversed the verdict on the issues of bad faith and punitive damages, Respondents filed a Notice of Appeal with the Ohio Supreme Court pursuant to Ohio Supreme Court Practice Rule II Section 2 (A).

Homestead did not file a cross-appeal in this case as it could have done pursuant to the Rule. Homestead could have raised in the Ohio Supreme Court any errors that it alleged occurred during the trial of this action, but, for some reason, chose not to bring those errors to the attention of the Ohio Supreme Court. This amounted to a waiver of any alleged errors.

SUMMARY OF ARGUMENT

The Ohio Supreme Court addressed all of Homestead's substantive assignments of error when it ruled on the assignments of error raised by Respondents. The only two errors which the Ohio Supreme Court did not address dealt with procedural matters at the trial, and Homestead waived these errors by failing to file a cross-appeal.

ARGUMENT

The Ohio Supreme Court, when ruling on Respondents' claimed errors, did consider and rule on all of the substantive errors Homestead raised in the Court of Appeals which Homestead now claims were never addressed. In order, Homestead raised the following errors in the Court of Appeals.

FIRST ASSIGNMENT OF ERROR

> The trial court's jury charge concerning the elements of the tort of bad faith was erroneous.

This assignment of error was clearly addressed by the syllabus of the Ohio Supreme Court's decision in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552.

SECOND ASSIGNMENT OF ERROR

> The trial court erred in denying defendant's motions for a directed verdict and its motion for judgment notwithstanding the verdict on plaintiff's bad faith claim.

The *Zoppo* court considered all of the evidence and held that:

> There was ample evidence to support the jury's finding that Homestead failed to conduct an adequate investigation and was not reasonably justified in denying Zoppo's claim.

This amounted to a finding that neither a directed verdict nor a judgment notwithstanding the verdict were justified.

THIRD ASSIGNMENT OF ERROR

> The trial court erred in denying the defendant's motion for a directed verdict on plaintiff's claims for punitive damages.

The *Zoppo* court addressed the adequacy of the evidence on this issue (Pet. App. p. 9a). In fact, the court started the discussion by stating:

> We must next determine whether there were sufficient facts presented for the jury to consider an award of "punitive damages".

The Court concluded that punitive damages were justified under Ohio law and stated:

> [T]he trial court had the obligation to determine that there was sufficient evidence that Homestead consciously disregarded Zoppo's rights. *Id.* The record reveals a one-sided inquiry by Homestead investigators as to who was at fault. They did not adequately question suspects or follow up on leads. Homestead breached its affirmative duty to conduct an adequate investigation. The award of punitive damages was justified.

Obviously, the Ohio Supreme Court did consider the issue in the course of determining whether or not to reinstate the jury verdict on punitive damages even though Homestead did not raise the issue by way of cross-appeal.

FOURTH ASSIGNMENT OF ERROR

The trial court's jury charge on the issue of punitive damages was erroneous.

Ohio law allows the recovery of punitive damages for malice, oppression, or insult. See Ohio Revised Code Section 2315.21. Malice has been interpreted by case law to include a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174.

Homestead objected to the trial court's definitions of "insult" and "oppression" even though these definitions came straight from the dictionary. The Ohio Supreme Court found that the evidence justified a finding of malice on the part of Homestead (Pet. App. p. 9a) so the claimed errors in the definitions of "insult" and "oppression" were meaningless.

FIFTH ASSIGNMENT OF ERROR

The trial court erred when it instructed the jury to consider emotional distress as an element of damages.

The Ohio Supreme Court also gave consideration to the issue of the compensatory award for attorney fees and emotional distress. The Court held in its opinion that "an insurer who acts in bad faith is liable for those compensatory damages flowing from the bad faith conduct of the insurer and caused by the insurer's breach of contract." (Pet. App. p. 10a) To allow Homestead to go

back to the Court of Appeals and argue that these compensatory damages do not include emotional distress suffered by an insured who has a claim denied by an insurance company in bad faith would not make sense given the language of the *Zoppo* opinion.

Despite its allegations to the contrary, Homestead did argue in this appeal that there was inadequate evidence to support the award for emotional distress:

> The case at hand is a particularly inappropriate vehicle for considering the issue of emotional distress. Appellant had no demonstrable emotional distress to consider. (Respondent's Appendix p. 40)

Homestead's argument on this exact issue continued on pages 40-42 of its brief, and included quotes from Mr. Zoppo's trial testimony on the mental distress the denial caused him.

After considering all of this evidence and argument, the Ohio Supreme Court reinstated the bad faith judgment returned by the jury. Obviously, the Ohio Supreme Court agreed with the majority rule throughout the country which allows the recovery of damages for emotional distress by an insured subjected to bad faith by an insurance company.

SIXTH ASSIGNMENT OF ERROR

> The trial court erred in the admission of evidence of a contingency fee agreement and in the jury charge concerning attorneys' fees.

SEVENTH ASSIGNMENT OF ERROR

The trial court erred in instructing the jury to deliberate further after the jury returned its general verdict and written interrogatories.

Although the Ohio Supreme Court did not address these issues directly in its opinion, the Court reinstated the attorney fee award. These are merely evidentiary issues that Homestead waived when it failed to file a notice of cross-appeal.

CONCLUSION

This appeal presents no issues of federal law. This case deals only with state law issues in insurance bad faith cases. Accordingly, there is no reason for the United States Supreme Court to get involved in this matter. Homestead's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

CASE NO. 93-1616

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
Eighth Appellate District
Cuyahoga County, Ohio
Case No. 62926

DONALD ZOPPO, et al.

Plaintiffs-Appellants

v.

HOMESTEAD INSURANCE COMPANY

Defendant-Appellee

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I. STATEMENT OF FACTS

In the early morning hours of October 13, 1988, Windy's Bar was badly damaged by fire. Windy's was owned and operated by plaintiff Donald Zoppo. It was insured pursuant to a policy of fire insurance issued by defendant Homestead Insurance company ("Homestead") only six months before the fire.

The fire loss was reported to Homestead by Mr. Zoppo's insurance agent, Edward Synek, on the morning of October 13. Homestead immediately engaged Howard Morman, who was acknowledged by one of plaintiffs' witnesses as "the best investigator there is in the Greater Cleveland area," to investigate the loss (Add. R. 24). Both Mr. Synek and Mr. Morman arrived on the scene around noon on October 13 and began to adjust the loss (Add. R. 14-20). Mr. Zoppo himself was nowhere to be found.

The initial investigation of the fire disclosed several important facts. One was that the fire was determined by the investigating authorities to be caused by arson. It was deliberately set and involved the use of gasoline or some other accelerant (Add. R. 28). Another was that Mr. Zoppo could not explain his whereabouts at the time of the fire or his activities on the night of the fire.

Mr. Morman took statements from Mr. Zoppo and from his girlfriend Jerri Garver on October 14, the day following the fire (Add. R. 29). Mr. Zoppo first told Mr. Morman that he was at a trailer parked at a campground near Pymatuning Lake on the night of the fire. He said that he had gone to the Pymatuning area the day before the fire for hunting. He said he was alone. He said he attempted to telephone his bar about 2:00 a.m. on October

13 and that he kept getting a busy signal. He said that he tried to telephone Ms. Garver at her home but got no answer. He said that he went to sleep, called the bar again upon awakening, still got a busy signal, and headed straight back to Cleveland merely because the line was busy. When he arrived in Cleveland he discovered that the fire had occurred (Deft. Ex. GG).

Mr. Morman also took a statement from Jerri Garver on the day following the fire. She said that Mr. Zoppo had actually spoken with her about 2:15 a.m. on October 13. She told him that she had closed the bar and that everything was all right (Deft. Ex. GG). In view of Ms. Garver's statement that she had spoken to Mr. Zoppo during the middle of the night, his abrupt return to Cleveland the following morning simply because of a busy signal is impossible to fathom.

Mr. Zoppo also told Mr. Morman that he had owned the building for about three years (Add. R. 30), when in reality he had owned it only six months. He denied having other insurance on the property or its contents (Add. R. 30), when in reality he did. Because of the incendiary nature of the fire and Mr. Zoppo's suspicious demeanor, Mr. Morman recommended to Homestead on October 14 that an expert in investigating fire origins be engaged (Add. R. 31).

Homestead engaged James Churchwell, who is an experienced fire investigation expert, to conduct an investigation of the cause and origin of the fire. Homestead also retained the law firm of Ulmer & Berne and Mr. Harold Reader of that firm to serve as its legal

counsel. Both Ulmer & Berne and Mr. Reader are experienced and able attorneys in the area of property insurance (Add. R. 32).

Mr. Churchwell undertook a thorough investigation of the fire. He interviewed firefighters (R. 328-335). He personally investigated and photographed the scene of the fire. He took photographs. He canvassed the neighborhood to determine what people knew about the cause of the fire. He spoke with a variety of individuals, including some of the individuals whose names were suggested by Mr. Zoppo and Mr. Zoppo's counsel as possible perpetrators of the arson (Add. R. 60-61). He obtained statements from Dave Pogue, a frequenter of the bar, that included information, admittedly hearsay, that Mr. Zoppo, Ms. Garver, and her sister were involved in both the fire of October 13 and an unsuccessful attempt at arson one month earlier (R. 378-383). While one can attempt to dismiss Mr. Pogue's statement because it contains hearsay, Mr. Pogue also recounted information about how the fire started that Mr. Churchwell knew was accurate from his own, personal observations (R. 382).

Mr. Churchwell analyzed the security of the building on the evening of the fire and when firefighters arrived. He prepared a comprehensive report of his investigation, concluding it about January 31, 1989 (Def. Ex. VV). One of plaintiff's insurance witnesses conceded that Mr. Churchwell's investigation "completely met" Homestead's duty to conduct a thorough investigation (Add. R. 13).

Mr. Churchwell also took second, more lengthy statements from Mr. Zoppo and Ms. Garver on October 18,

1988. He explored in more detail their activities on the night of the fire. Mr. Zoppo again claimed that he repeatedly attempted to call his bar about 2:15 a.m. and always got a busy signal. He said that after sleeping in his trailer, he arose about 9:00 a.m., called the bar, could not get through, and came immediately home because of his concern (Add. R. 89).

When Mr. Churchwell spoke the same day to Ms. Garver, she no longer claimed that she had spoken to Mr. Zoppo during the night of October 13. But she did say that she and her sister had driven to Pymatuning during the night after learning of the fire. She said that they arrived at Mr. Zoppo's trailer about 7:00 a.m., and that he was nowhere to be found. They drove around the Pymatuning area looking for him, eventually gave up, and returned to Cleveland. The Garver sisters were back in Cleveland and at Mr. Zoppo's bar for some time before he showed up at the fire scene (Add. R. 89).

Mr. Churchwell wondered how could it be that the Garver sisters could arrive at the trailer at 7:00 without finding Mr. Zoppo, who was supposedly sleeping there until 9:00. He also wondered how the Garver sisters could have arrived back in Cleveland ahead of Mr. Zoppo if he had departed Pymatuning before their arrival and driven straight home because of his concern. Mr. Zoppo attempted to explain the discrepancy, first by volunteering that perhaps he had gone out into the woods that morning, and later by remembering that he had stopped for a leisurely breakfast before rushing home (Add. R. 89).

The different explanations for Mr. Zoppo's whereabouts continued. When Mr. Zoppo gave a statement under oath on December 30, 1988, to attorneys at Ulmer & Berne, he claimed that he stayed at a motel in the Pymatuning area on the night of the fire (Deft. Ex. CCC).

Homestead's investigation of the loss was not limited to inquiring about Mr. Zoppo's whereabouts. In addition to Mr. Churchwell's investigation, Mr. Walter Kolody of Homestead's home office in New Jersey came to Cleveland to inspect and videotape the scene of the loss (Add. R. 41). Mr. Morman obtained the fire department report of the fire, which indicated that the structure was secure when firefighters arrived and that a forced entry was required (Add. R. 33). Mr. Morman confirmed the building security in conversations with fire officials (Add. R. 35-40), discussed the case with the police arson squad (Add. R. 34), and either personally or through intermediaries examined court records, records of liquor purchases, and insurance records that were available at the office of Mr. Synek, Mr. Zoppo's agent. Ulmer & Berne analyzed documents and records, including tax returns and other financial information requested of Mr. Zoppo.

A number of facts were clear from the investigation. They included:

1. There was no evidence of a break-in on the night of the fire. Firefighters advised Mr. Morman and Mr. Churchwell that all doors and windows were secure upon their arrival. While it is true that when Mr. Churchwell inquired further about building security, he learned that the fire department could not be absolutely certain that one rear

door was secure (although all believe it was), because of the damage it sustained in the fire, the fact remains that there was no evidence of a break-in. The fire department considered the building to be secure when it prepared its reports concerning the fire, which compels the conclusion that whoever started the fire locked the building on the way out. Only Mr. Zoppo and the Garver sisters had keys.

2. The fire was called to the fire department about 2:52 a.m. The fire department arrived at the scene at 2:56 a.m. and found the building well engaged in fire. The extent of the fire at the time of the fire department's arrival suggested that the fire commenced either before or shortly after Ms. Garver closed the bar at 2:00 a.m. (R. 327-328).

3. Mr. Zoppo bought the building for $10,000 less than six months before the fire (Add. R. 18, 42, 47-53). He had told Mr. Morman that he had owned it about three years. The circumstances concerning the purchase were peculiar. Mr. Zoppo was making only $8,000 to $10,000 a year from the bar (Add. R. 54-56, 70, 76, 82). The neighborhood on the near west side was changing for the worse, and Mr. Zoppo's business was not robust. Buying the building, for a reported $10,000, was a dubious decision. Shortly after buying the building for $10,000, Mr. Zoppo then obtained building insurance from Homestead Insurance and insured it for $50,000. The insurance he obtained from Homestead had an annual premium of $4,700, and Mr. Zoppo financed the first premium payment

at an interest rate of 15.25% (Add. R. 22-23). The cost of the insurance reduced by approximately 50% the income Mr. Zoppo realized from his business annual.

4. Mr. Zoppo had reportedly been in Pymatuning one night in September, 1988, when an attempt to set fire to the bar had occurred. One of the Garver sisters had driven to Pymatuning to find him on that occasion as well, but again without success.

5. If Mr. Zoppo was being truthful that he did not know of the fire until he returned to Cleveland late in the morning of October 13, there is absolutely no explanation for insurance investigators and his own insurance agent being on the scene before he was! The fire was reported to Mr. Zoppo's insurance agency about 9:00 a.m., presumably by Mr. Zoppo. Mr. Zoppo claimed that he didn't even know of the fire for hours later, but there is no evidence that anyone else reported the claim (Add. R. 62-66).

Mr. Morman and Mr. Churchwell concluded that Mr. Zoppo was involved in starting the fire (Add. R. 43.58, 67). Ulmer & Berne supervised the investigation, analyzed its results, took Mr. Zoppo's statement under oath, and ultimately wrote a lengthy letter to Homestead (Add. R. 98) recommending that the claim be denied. In a letter dated March 19, 1989, Homestead denied Mr. Zoppo's claim for the reason that it had concluded that he was involved in setting the fire (Add. R. 68). Mr. Zoppo filed suit for damages due for breach of the insurance contract and for bad faith.

During the course of discovery, additional facts of significance, confirming Mr. Zoppo's involvement in the fire and his lack of candor, were disclosed. First, Elsie Zoppo, Mr. Zoppo's ex-wife, testified that Mr. Zoppo had left a phone number with her while he was in Pymatuning. She testified that she called the number between 5:00 and 6:00 a.m. October 13, shortly after learning about the fire. Mr. Zoppo was not available when she called, but he called back within 45 minutes. She told him about the fire. He said he already knew about it (Add. R. 5-12). Her testimony, which is quite detailed and logical, seemed to refute all that Mr. Zoppo had ever said about his whereabouts and activities and her testimony clearly demonstrated that Mr. Zoppo knew about the fire before he drove to the bar late in the morning on October 13.

Second, Edward Synek, Mr. Zoppo's insurance agent, testified on deposition that he received the call reporting the loss from Mr. Zoppo (Add. R. 25-26). That call also occurred hours before the time Mr. Zoppo claimed he learned of the fire. At trial Mr. Synek testified that he was at the fire scene by late morning or noon on October 13 after receiving the telephone notification of the fire at about 9:00 a.m. (Add. R. 17-21).

Mr. Morman, Mr. Churchwell, and Mr. Reader all testified at trial. The many inconsistencies in Mr. Zoppo's statements, his inability to account for his whereabouts, his inability to explain how he learned of the fire to call Mr. Synek, and the other aspects of the investigation were explained to the jury. Mr. Morman and Mr. Churchwell testified regarding their personal conclusions that Mr. Zoppo was involved in starting the fire. Mr. Reader testified concerning his recommendation to Homestead that it

deny Mr. Zoppo's claim and the reasons for his recommendation. This evidence established that Homestead had been advised by experienced adjusters, investigators and attorneys that there was a lawful basis for the denial of the claim. Homestead conducted a thorough investigation of the claim and came to an honest and lawful conclusion that it was not obligated to satisfy Mr. Zoppo's claim.

In opposition to this evidence, plaintiff presented the testimony of John Williams, a retired insurance adjuster. Mr. Williams offered the expert opinion that Homestead was not justified in making a denial of the claim "at the time they did" (Add. R. 27). The basis for Mr. Williams' opinion was the contention that Homestead should have taken additional statements from peripheral witnesses and done further work to attempt to verify Mr. Zoppo's whereabouts at the time of the fire. Mr. Williams did not claim that any additional statements were required of Mr. Zoppo or those immediately involved in the events surrounding the fire. He did not claim that Homestead had intentionally denied Mr. Zoppo's claim with knowledge that it had no lawful basis to do so. He did not express any opinion that would support the conclusion that Homestead had breached its duty of good faith as that duty has been defined by decisions of this Court.

Indeed, Mr. Williams agreed that it was reasonable to conclude from the evidence adduced during Homestead's investigation and at trial that Mr. Zoppo was involved in setting the fire. He agreed on cross-examination that the basic, elementary facts of the investigation permitted no conclusion other than that Mr. Zoppo knew of the fire long before he claimed to have learned of it and no

conclusion other than that Mr. Zoppo was involved in the fire. Even if the "reasonable justification" standard advanced by plaintiff were the test for determining good faith, Mr. Williams' testimony confirms that "reasonable justification" existed for concluding that Mr. Zoppo was involved in setting the fire in question.

II. STATEMENT OF THE CASE

Mr. Zoppo's case against Homestead proceeded to trial on August 26, 1991. His claims for breach of contract and for bad faith were tried simultaneously. At the close of the plaintiffs' case, Homestead moved for a directed verdict as to the claim for bad faith and as to the claim for punitive damages. These motions were denied, although the trial court did state on the record that the motion regarding punitive damages was being denied only because the court believed that O.R.C. 2315.21 modified the common law standard for awarding punitive damages. The trial court agreed that plaintiffs' proof did not establish actual malice or a basis for recovery under the test established in *Preston v. Murty*, 32 Ohio St. 3d 334 (1987) (Tr. 871-78).

Homestead renewed its motions for directed verdicts at the conclusion of all the evidence, and they were again denied (Tr. 1295-96). The trial court submitted the issues of breach of contract, bad faith, and punitive damages to the jury. The trial court also instructed the jury that it should award attorneys' fees to plaintiffs as additional compensatory damages if the jury found that punitive damages were appropriate. Both general verdicts and written interrogatories were submitted to the jury.

The jury returned general verdicts in favor of Mr. Zoppo on all issues. The written interrogatories were answered in ways that were consistent with the general verdicts. The jury awarded Mr. Zoppo $80,000 in compensatory damages on the contract claim and $122,800 in compensatory damages on the bad faith claim. In answering the court's interrogatory regarding punitive damages, the jury answered that they should be awarded and indicated on the interrogatory that Homestead had acted with "insult."

The jury concluded that the reasonable attorneys' fees incurred by Mr. Zoppo were $65,000 and so indicated in their interrogatory answers. After the verdicts were returned, plaintiffs' counsel asked the court to instruct the jury to deliberate further, claiming that their was a possible inconsistency between the interrogatories and the general verdict regarding the bad faith claim. Plaintiffs' counsel claimed that it could not be determined whether the $122,800 damage amount included the $65,000 attorneys' fees.

The trial court first concluded, and rightly so, that there was no inconsistency The court then reversed its ruling and, over objection, instructed the jury to deliberate further regarding the questions of bad faith damages and attorneys' fees and to modify the general verdict if attorneys' fees were intended to be in addition to the amount of compensatory damages. The jury did modify the general verdict so that it awarded $187,800 to plaintiffs (Tr. 1458-70).

The trial court entered judgment on the verdicts, as modified, in a total amount of $267,800 for compensatory

damages. Pursuant to the jury's instruction that punitive damages be assessed, judgment for an additional $50,000 for punitive damages was entered by the trial court, making the total judgment $317,800.

Homestead filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial. Plaintiffs filed a motion for prejudgment interest and for costs. Save for awarding plaintiffs some modest litigation expenses, all post-trial motions were denied. Homestead filed a timely notice of appeal, and plaintiffs a notice of cross-appeal.

Homestead appealed. Mr. Zoppo filed a cross appeal. Homestead assigned eight assignments of error on appeal, and Mr. Zoppo four. The Court of Appeals affirmed the award of damages in favor of Mr. Zoppo as respects his breach of contract claim, reversed the judgment as far as the bad faith claim was concerned, and dismissed Homestead's remaining assignments of error as moot.

Mr. Zoppo's appeal to this court followed, and the court has accepted jurisdiction.

III. LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1

A CAUSE OF ACTION ARISES FOR THE TORT OF BAD FAITH WHEN AN INSURER BREACHES ITS DUTY OF GOOD FAITH BY INTENTIONALLY REFUSING TO SATISFY AN INSURED'S CLAIM WHERE THERE IS EITHER (1) NO LAWFUL BASIS FOR THE REFUSAL COUPLED WITH ACTUAL KNOWLEDGE OF THAT FACT OR (2) AN INTENTIONAL FAILURE TO DETERMINE WHETHER THERE WAS AN LAWFUL BASIS FOR SUCH REFUSAL. INTENT THAT CAUSED THE FAILURE MAY BE INFERRED AND IMPUTED TO THE INSURER WHEN THERE IS A RECKLESS INDIFFERENCE TO FACTS OR PROOF REASONABLY AVAILABLE TO IT IN CONSIDERING THE CLAIM. (*Motorists Mutual Ins. Co. v. Said*, 63 Ohio St. 3d 690 (1992), followed).

A. The Majority View

The express purpose of this Court's recent consideration of the case of *Motorists Mutual Insurance Co. v. Said*, 63 Ohio St. 3d 690 (1992), was "to clarify the standard upon which bad faith is predicated under Ohio law." *Said, supra*, 63 Ohio St. 3d at 694. The decision in *Said* accomplishes this purpose. The syllabus of *Said* sets forth a standard that is consistent not only with the rule of law adopted in the majority of jurisdictions that have recognized a common law tort for insurance bad faith but also with this court's own precedent.

Appellant and those supporting appellant's position on appeal argue that *Said* is an aberration They argue that it adopts a minority position. They argue that it is a departure from previous precedent. They argue that it is unsound and should be reversed.

All of these arguments are inaccurate. *Said* should continue to be law of Ohio. Bad faith should not be equated with simple negligence. The judgment of the Court of Appeals should be affirmed.

The contention that *Said* represents a minority view of the definition for bad faith is patently incorrect. Anyone conducting a canvass of other jurisdictions would quickly recognize that the contention is incorrect. Appellant claims that "[t]he vast majority of states" have adopted a "reasonable justification" standard as the definition of bad faith (appellant's brief at page 13), and cites only five cases in support of the proposition. Even worse, four of those cases cited by appellant have been either misinterpreted by appellant or overruled. The fifth is from Washington, a state that imposes a duty of good faith by statute, not by common law.

For example, appellant cites *Noble v. National Am. Life Ins. Co.*, 128 Ariz. 188, 624 P.2d 866 (1981), in support of the "reasonable justification is the majority rule" argument. In point of fact, *Noble* addressed the issue of whether Arizona should recognize the tort of bad faith in any form. The case involved an issue of pleading, not of proof. One of the arguments against the tort was that its elements were not clearly defined. The Supreme Court concluded that the tort should be recognized, disagreed with the claim that it was not clearly defined, and wrote that "the best exposition" of the elements of the tort was the Wisconsin Supreme Court's discussion in *Anderson v. Continental Insurance Co.*, 85 Wis. 2d 675, 271 N.W.2d 378 (1978):

> To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. It is apparent, then, that the tort of bad faith is an intentional one.

The Supreme Court of Arizona made clear that bad faith was an intentional tort, not merely an act of negligence, in *Deese v. State Farm Mut. Auto Ins. Co.*, 172 Ariz. 504, 838 P.2d 1265 (1992).

Appellant's discussion of Delaware law and the case of *Casson v. Nationwide Insurance Co.*, 455 A.2d 361 (Del. 1982), is also inaccurate. *Casson* is a decision of a single judge of a trial court. The plaintiff in *Casson* sued an insurer who refused to pay medical benefits and included a claim for bad faith in his complaint. The trial court concluded that Delaware had not recognized a cause of action for bad faith, *assumed for purposes of discussion* that the tort would be recognized, and concluded that the insurer would nonetheless be entitled to summary judgment because there was no showing of "arbitrariness" in denying the claim. *Casson* does not even stand for the proposition that the tort of bad faith exists in Delaware, let alone that the state equates bad faith with a lack of reasonable justification.

Nor is the law in Texas what appellant claims it to be. The Supreme Court of Texas confirmed in *Aranda v. Ins. Co. of North America*, 748 S.W.2d 210 (1988), that lack of reasonable justification for payment of a claim was not sufficient to establish bad faith. Proof that the insurer knew that there was no legitimate basis for denial or

proof that the insurer failed to investigate to determine whether there was a legitimate basis for denial is an indispensable element of the tort. The issue in *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (1987), the Texas case cited by appellant, was whether the tort existed, not whether an intentional tort or a negligence standard should apply. Texas law is entirely consistent with *Said*.

Nor does *Dueringer v. General American Life Ins. Co.*, 853 F.2d 283 (5th Cir. 1988), stand for the proposition advanced by appellant. *Dueringer* is a federal decision construing Mississippi law, not Colorado law as claimed by appellant. The language quoted by appellant is taken from a footnote, not the text of the opinion (853 F.2d 287 at note 8). The footnote itself makes clear that one of the reasons the court was entering judgment as a matter of law was the absence of evidence of a "bad faith motive or conduct," and on the same page as the footnote the court makes clear that Mississippi law imposes liability for bad faith only upon proof of conduct "more serious and egregious" than negligence, conduct that can be described as "gross or callous or wanton or accompanied by fraud or deceit." Mississippi law imposes a standard for bad faith more difficult to prove than the standard contained in *Said* (*see also Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844 (S.D. Miss 1990)).

The fact of the matter is that the "vast majority" of states that have recognized a common law tort for bad faith have developed definitions of bad faith that are comparable to, if not more stringent than, the definition set forth in *Said*. Eight jurisdictions do not recognize the

tort at all, which is by definition the most rigorous standard possible: a plaintiff can never prove that an insurer acted in bad faith. Ohio is one of eighteen states that define "bad faith" in a manner comparable to that found in *Said*. At least two states impose the greater burden of proving malicious or dishonest conduct. At least four states have either recognized or assumed the existence of the tort (*e.g.*, Delaware, *supra*), but without defining its terms.[1] When one recognizes that bad faith claims are based upon statutes in 14 states, not many states remain. The contention that *Said* reflects minority view of the common law definition of bad faith is as incorrect as it could possibly be. *Said* is a decision that is part of the vast majority of judicial decisions.

B. Bad Faith as Defined by the Opinions of this Court.

The word "reasonable" and the phrase "reasonable justification" can be found in virtually all of the decisions of this court discussing the tort of bad faith. Certainly the issue of whether an insurer acted reasonably is among the criteria to be considered in analyzing whether an insurer satisfied its obligation to act in good faith.

But "reasonable justification" has never been the legal standard for defining good faith in Ohio. It was not the standard before *Said*. It would not be the standard but for *Said*. It should not become the standard now.

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[1] See brief of *amicus curiae* The Ohio Insurance Institute for a more thorough listing of the common law of various states.

The law of a Supreme Court opinion is contained in the syllabus of the case, Supreme Court Rules for the Reporting of Opinions, Rule 1(B). The opinions that follow the syllabus are intended to reveal the underlying analysis of the court or individual justices, but the syllabus of the case sets forth the controlling law.

The controlling law – that is, the syllabi – in decisions of this court dealing with the tort of bad faith have been completely consistent, and none of them stands for or suggests the proposition that a reasonable justification standard, *i.e.*, a negligence standard, defines bad faith. The pertinent syllabi prior to *Said* are as follows:

> *Hart v. Republic Mutual Ins. Co.*, 152 Ohio St. 185 (1949):
>
> 1. A liability insurance company which reserves the right to settle, as it deems expedient, any claim against its insured is not liable to the insured for negligence in settling or refusing to settle such a claim.
>
> 2. Such company is liable to respond in damages to its insured if it fails to act in good faith with respect to the settlement of such a claim.
>
> *Slater v. Motorists Mutual Ins. Co.*, 174 Ohio St. 148 (1962):
>
> 1. In an action by an insured against his insurer to recover the amount of a judgment rendered against him in a tort action in excess of the policy limit, such insured must allege and prove a lack of good faith on the part of the insurer either in negotiations respecting a settlement of the claim against

the insured or in the conduct of the trial of the tort action on behalf of the insured.

2. A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Hoskins v. Aetna Life Insurance Co. (1983), 6 Ohio St. 3d 272:

1. Based upon the relationship between an insurer and its insured, an insurer has the duty to act in good faith in the handling and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the insurer. (*Hart v. Mutual Ins. Co.*, 152 Ohio St. 185 [39 0.0. 365], followed and extended.)

2. Punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer. (*Columbus Finance v. Howard*, 42 Ohio St. 2d 178 [71 0.0. 2d 174], applied.)

Staff Builders. Inc. v. Armstrong, 37 Ohio St. 3d 298 (1988):

1. An insurer has a duty to act in good faith in the processing and payment of the claims of its insured. A breach of this duty will give rise to a cause of action in tort against the

insurer irrespective of any liability arising from breach of contract. (*Hoskins v. Aetna Life Ins. Co.* [1983], 6 Ohio St. 3d 272, 6 OBR 337, 452 N.E. 2d 1315, approved and followed.)

2. Punitive damages may be recovered against an insurer that breaches its duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer. (*Hoskins v. Aetna Life Ins. Co.* [1983], 6 Ohio St. 3d 272, 6 OBR 337, 452 N.E. 2d 1315, approved and followed.)

None of these syllabi use the term "reasonable justification." None of them contain the word "reasonableness." Only *Hart* employs the term negligence, and it does so to expressly state that negligence is not a basis for extra-contractual liability and that negligence is not bad faith. *Said* is consistent with all of these prior decisions of this court. It requires an insured to prove more than negligence in order to establish the tort of bad faith. The first proposition of law advanced by appellant would alter Ohio law in a radical way, adopt a definition of bad faith that has already been rejected by this court and by the majority of other jurisdictions. The relationship between insurer and insured arises from their contract of insurance, not from a common law relationship controlled by the law of negligence. A negligence standard for bad faith finds support in neither precedent nor logic.

Appellant, perhaps recognizing the weakness of a candid, straight forward argument for a negligence standard for bad faith, attempts to cast the "reasonable justification" standard as something other than negligence, a

"middle ground" between negligence and the majority rule of intentional misconduct. The approach is disingenuous. The "reasonable justification" standard is nothing but the negligence standard in masquerade. Adopting the reasonable justification standard would subject insurers to liability because they did not act reasonably, or as the "reasonably prudent insurer," or as the "reasonable man."

Witness the record in this case. Appellant's argument, and the testimony of his expert witness, was that Homestead did not act reasonably. It was negligent. It should have done more. More witnesses should have been interviewed. More alibis should have been checked. Because Homestead did not act reasonably, appellant argued, the denial was not reasonable "at the time" it was made. The argument and expert testimony was predicated entirely upon a negligence theory of liability. Appellant's expert conceded that the fundamental evidence of the case permitted no conclusion other than that Mr. Zoppo had been involved in starting the fire. Yet, the issue of bad faith was submitted to the jury because of the expert's opinion that Homestead should have done more before denying the claim. We submit that in absolutely every case the suggestion can be made that the insurer should have done more, no matter how much has already been done. Will the law in Ohio be that every disputed claim presents a jury issue on bad faith? Is a jury issue created by an expert's opining that an insurer could have done more?

C. **The Doctrine of *Stare Decisis*.**

The opinion in *Said* was announced less than twenty-two months ago. Appellant does not claim that the bench and bar in Ohio have had difficulty understanding or implementing the decision. It is not claimed that the decision of the court of appeals in this case is in conflict with the decision of any other decision from a Court of Appeals *in this state*.

Under the circumstances, to review *Said* simply to review a recently decided issue is contrary to the doctrine of *stare decisis* and the principles that the doctrine embraces. As this Court wrote in *City of Rocky River v. State Employment Relations Board*, 43 Ohio St. 3d 1, 5 (1989):

> Uniformity and continuity in law are necessary for us to deal with our daily pursuits. We need to preserve the integrity of contractual agreements, wills, conveyances of property and our dealings in the commercial marketplace. The applications of the principles of tort cannot be an ever changing concept. What is negligence in the morning must also be negligence in the afternoon. To permit such standards to be in a continual state of flux would invite havoc.
>
> The doctrine of *stare decisis* provides solid rocks upon which men and women can build and arrange their affairs with confidence. The doctrine serves to remove the capricious element from the law and lends stability to society. *Stare decisis* is a strong tie which our future has with our past.

Similarly, the Court wrote in *Clark v. Snapper Power Equipment, Inc.*, 21 Ohio St. 3d 58, 60 (1986):

> It is the policy of courts to stand by precedent and not to disturb a point once settled. The doctrine of *stare decisis* is one of policy which recognizes that security and certainty require that an established legal decision be recognized and followed subsequent cases where the question of law is again in controversy.

See also In re Copley, 29 Ohio St. 2d 35 (1972); *Hall v. Rosen*, 50 Ohio St. 2d 135 (1977); *Vasquez v. Hillery*, 474 U.S. 254 (1985).

To overrule *Said*, only months after deciding it and for no purpose other than to redefine the elements of the tort of bad faith, would not promote stability in the law or in society. What is not bad faith in 1992 should not be bad faith in 1994. The bench, bar and citizenry of Ohio should be permitted to rely upon the announced decisions of this Court as establishing rules of law that apply in all cases, not only the case presently before the Court.

Said determined an important legal point concerning the elements of the tort of bad faith. The decisions of lower courts since the announcement of *Said* have described it as a decision that "clarified" the law. See the opinion of the Court of Appeals below at p. 5. The Court of Appeals did not find *Said* to be unclear or confusion. Nor did the Franklin County Court of Appeals in *Critchfield v. Century Surety Co.*, unreported, No. AP-708 (1992 Ohio App. Lexis 6781) (1992), or the Montgomery County Court of Appeals in *Bullett Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App. 3d 327 (1992). For the Court to revisit the same issue of law, and reverse itself without the

slightest indication of confusion or inconsistency in Ohio's trial and appellate courts is contrary to all pronouncements concerning *stare decisis.*[2]

We are well aware that the importance of the doctrine of *stare decisis* has been a subject of discussion in several recent decisions of the court, *see Gallimore v. Children's Hospital Medical Center,* 67 Ohio St. 3d 244 (1993); *Savoie v. Grange Mutual Insurance Co.,* 67 Ohio St. 3d 500 (1993). We are not claiming that *stare decisis* requires, in this case or any other, that a recently decided case be followed for a specific period of time. This court always has the power to overrule its own decisions, even those entered last week.

Stare decisis has nothing to do with power or authority. It has everything to do with wisdom and judicial restraint. If this court constantly refuses to follow its own recent precedent, the law of the state lacks all measure of predictability and certainty. No attorney can ever advise a client that a point of law is settled. No attorney can ever advise a client that an appeal – and an eventual appeal to the Supreme Court – should not be pursued. Every change in the composition of the members of the court, such as the change that has occurred since then, places the continuing validity of all recent decisions, at least all recent four-to-three decisions, in doubt.

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[2] As set forth herein, this Court honored the principle of *stare decisis* in the *Tokles & Son, Inc. v. Midwestern Indemnity Co.,* 65 Ohio St. 3d 621 (1992). An insurer's bad faith was one of the issues on appeal, and the definition of bad faith set forth in *Said* was aptly applied by the Court. No dissent was filed as respects the bad faith section of the opinion.

Apart from the change in membership of the court, nothing has occurred in jurisprudence, in Ohio or elsewhere, to suggest that *Said* should be revisited, let alone reversed. *Said* reflects the majority view of the law of insurance bad faith. It is consistent with prior pronouncements of this court. It has been well received by Ohio's appellate courts. There is no conflict between courts of appeal. No contrary novel or landmark decision has been recently decided in another state or jurisdiction. Not even critics of the decision can seriously claim that *Said* is an unconscionable or intolerable rule of law. Considering all these circumstances, *stare decisis* suggests that *Said* should not be disturbed.

PROPOSITION OF LAW NO. 2

WHERE AN INSURER CONDUCTS A PROMPT AND THOROUGH INVESTIGATION OF AN INSURANCE CLAIM, WHERE INDEPENDENT CLAIM ADJUSTERS AND EXPERIENCED LEGAL COUNSEL ADVISE THE INSURER THAT A FACTUAL AND LEGAL BASIS EXISTS FOR DENYING THE INSURED'S CLAIM, WHERE THE INSURER BELIEVES THAT IT HAS A VALID BASIS FOR DENYING THE CLAIM AND ACCEPTS THE RECOMMENDATIONS OF ITS LEGAL COUNSEL AND INDEPENDENT ADJUSTERS, AND WHERE THE EVIDENCE ESTABLISHES THAT CERTAIN FUNDAMENTAL FACTS PERTAINING TO THE LOSS PERMIT NO CONCLUSION OTHER THAN THAT THE INSURED HAS PRESENTED A FRAUDULENT CLAIM, THE INSURER HAS, AS A MATTER OF LAW, NOT ACTED IN BAD FAITH IN DENYING THE CLAIM.

It is difficult to imagine a weaker case for bad faith than the case at hand. Homestead initiated a prompt,

thorough, and competent investigation of the fire in question. Homestead retained Howard Morman, who was described as the best investigator in Ohio, immediately upon learning of the fire. James Churchwell, a competent fire investigator, was retained within a day. Harold Reader, an experienced and respected attorney in matters relating to property claims, was retained as soon as the need for counsel was recognized.

Each of these able individuals advised Homestead that the claim should be denied because of Mr. Zoppo's apparent involvement with the fire. Their advice was based upon a logical and reasonable assessment of the facts developed during the course of the investigation and, in Mr. Reader's case, upon an analysis of applicable legal considerations. Appellant's expert agreed that it was reasonable to conclude that Mr. Zoppo was involved in the fire.

Where an insurer conducts a prompt, thorough, and fair investigation of an insured's claim, and where that investigation leads those conducting it to honestly conclude and recommend to the insurer that the insured is not entitled to coverage and that the claim should be denied, and where the insurer accepts and follows those recommendations, the insurer has a reasonable basis for denying the insured's claim and has not breached the duty to act in good faith.

Even if this Court concludes that *Said* should be modified, Homestead would nonetheless be entitled to judgment on the bad faith claim, and the case should be remanded for further consideration.

PROPOSITION OF LAW NO. 3

OHIO REVISED CODE § 2315.21(C) (2) IS NOT UNCONSTITUTIONAL. A LITIGANT HAS NO CONSTITUTIONAL RIGHT TO HAVE THE AMOUNT OF A PUNITIVE DAMAGE AWARD DETERMINED.

Although punitive damage awards have been permitted under the common law, appellant has no constitutional right to a jury calculation of the amount to be awarded for punitive damages. Both the United States Supreme Court and this Court have found that it is appropriate for the Court, not the jury, to determine the *amount* of a penalty award.

Since all legislative enactments are presumed to be constitutional, this Court's function does not include a review of the wisdom of a legislative enactment. Rather, when a statute is challenged on constitutional grounds "the sole function of the court is to determine whether it transcends the limits of legislative power." *State ex rel. Bishop v. Bd. of Edn.*, 139 Ohio St. 427, 438 (1942).

In *Tull v. United States*, 481 U.S. 412, 95 L.Ed. 2d 365, 107 S. Ct. 1831 (1987), the federal government had sued a real estate developer for violations of the Clean Water Act. After the District Court imposed civil penalties in the sum of $325,000, the developer challenged the Court's imposition of penalties as a violation of his constitutional right to a jury trial. The United States Supreme Court held that there was a constitutional right to a jury trial to determine petitioner's *liability*, but that there was no constitutional right to a jury determination of the *amount* of the civil penalty. The Court wrote:

> The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." . . . Is a jury role necessary for that purpose? We do not think so. " 'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.' " . . . ([T]he Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements"). The assessment of a civil penalty is not one of the "must fundamental elements". . . . The assessment of civil penalties thus cannot be said to involve the "substance of a common-law right to a trial by jury," nor a "fundamental element of a jury trial" . . . We therefore hold that a determination of a civil penalty is not an essential function of a jury trial for that purpose in a civil action. [Citations omitted.]

Id. at 481 U.S. 412, 425-427.

Similarly, in *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 742 (4th Cir. 1989), the Court concluded:

> There is no principled distinction between civil penalties and the modern concept of punitive damages. Both serve the same purpose to deter and punish proscribed conduct. Consistent with *Tull*, we hold that the Seventh Amendment does not require that the amount of punitive damages be assessed by a jury.

Appellants challenge the constitutionality of O.R.C. §2315.21 (C) (2) which provides:

> In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damage, the amount of those damages shall be determined by the court.

Appellant does not cite any cases which support this challenge. The two Ohio decisions mentioned by a appellant is irrelevant to the present constitutional discussion. Neither *Brady v. Safety-Kleen,* 61 Ohio St. 3d 624 (1991) nor *Morris v. Savoy,* 61 Ohio St. 3d 684 (1991) were focused upon the constitutionality of the Court assessing the amount of a punitive damage award. *Brady* dealt with the constitutionality of a Workers' Compensation statute while *Morris* reviewed the constitutionality of a cap on medical claim damage awards.

Various Ohio courts have discussed the purpose and availability of punitive damages. In *Convention Center Inn Ltd. v. Dow Chemical Co.,* 19 Ohio Misc. 2d 15, 16 (C.P. Cuyahoga Co. 1984), the court wrote:

> No party is entitled to punitive damages as a matter of right. There is no vested right to even sue for punitive damages. The purpose of punitive damages is not to compensate. Their purpose is to punish and deter.

See also Gray v. Allison Division, General Motors Corp., 52 Ohio App. 2d 348, 354, 370 N.E.2d 747 (Cuyahoga Co. 1977) (Punitive "damages are awarded as punishment for the malicious intent of the defendant, and not as compensation for the benefit of the plaintiff.")

Quite recently this Court relied upon *Tull v. United States* and O.R.C. § 2315.21 when it ruled that there is no constitutional right to a jury determination of an award

of attorney's fees. *Digital & Analog Design Corp. v. North Supply Co.*, 63 Ohio St. 3d 657 (1992).

Digital had filed suit against North Supply Co. (NSC) claiming that NSC had seized Digital's goods and committed conversion, trespass, wrongful seizure of property and other tortious acts. After the jury returned a verdict in favor of Digital, the lower court denied Digital's post trial motion for attorney fees. The lower court agreed with NSC's assertion that NSC had a right to a jury determination as to whether NSC was liable for attorney fees and the amount of any award. Any post trial procedure on these issues was held by the lower court to be constitutionally insufficient.

This Court disagreed and wrote in May of 1992:

> Although the right to a trial by jury in civil actions under the Ohio Constitution is "inviolate" under Section 5, Article I, a right to trial by jury on a particular cause of action exists only if the action is one that was recognized as a jury issue at common law prior to the adoption of the Ohio Constitution.
>
> Furthermore, we have long held that a right to a jury trial does not exist if the relief sought is equitable rather than legal. *Taylor v. Brown* (1915), 92 Ohio St. 287, 110 N.E. 739. The award of attorney fees, although seemingly compensatory and treated as such in the model jury instruction, does not compensate the victim for damages flowing from the tort. Rather, *the requirement that a party pay attorney fees* under these circumstances is a *punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages.* There is no

separate tort action at law for the recovery of attorney fees under these circumstances. *Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees unless there is a basis for sanctions under Civ. R 11.*

As the United States Supreme Court held in *Tull v. United States* (1987), 481 U.S. 412, 425-426, 107 S.Ct. 1831, 1839-1840, 95 L.Ed.2d 365, 378-379, *there is no federal constitutional guarantee for a jury trial in the remedy stage of a civil proceeding in the federal courts.*

In view of our determination that attorney fees are punitive in nature, *we find it wholly appropriate to treat attorney fees in the same manner as punitive damages with respect to whether such an issue is to be presented to a jury.* As a matter of custom, we have viewed the issue of a defendant's *liability* for punitive damages as a jury question, and we have permitted juries to set the *amount* of those damages. *The General Assembly, through its enactment of R.C. 2315.21* and the amendment of R.C. 2315.18, *has now clarified that it is a proper function for the trial court in a jury trial in a tort action to determine the amount of punitive damages but that the issue of liability is expressly reserved to the jury.* Although those provisions were not in effect at the time the instant cause of action arose, *we are nonetheless persuaded that the approach taken by the legislature is the proper course* for the development of the common law of this state. *Id.* at 661-663. (Emphasis added).

Thus, the existence of punitive damage awards under the common law did not create a constitutional right to a jury trial for the determination of the amount of punitive

damages. The amount of such damages, if any, may be calculated by the Court.

PROPOSITION OF LAW NO. 4

AN INSURED WHO PROVES BAD FAITH ON THE PART OF AN INSURER IS NOT AUTOMATICALLY ENTITLED TO RECOVER INTEREST, ATTORNEYS' FEES, LITIGATION EXPENSES, AND DAMAGES FOR EMOTIONAL DISTRESS MERELY BECAUSE BAD FAITH HAS BEEN PROVEN.

There is no rhyme or reason for holding that an insured who proves that an insurer has acted in bad faith is *ipso facto* entitled to a panoply of damages that other successful tort claimants are not entitled to recover. This is particularly so when one remembers that the appellant in this case seeks to transform the tort of bad faith into a simple act of negligence.

The case at hand is a particularly inappropriate vehicle for considering the issue of emotional distress. Appellant had no demonstrable emotional distress to consider. The court instructed the jury to consider plaintiffs' emotional distress to determine damages. Without defining emotional distress, the court instructed the jury:

> Now, in determining the actual amount of the compensatory damages on plaintiff's bad faith claim, you are to consider the emotional distress of the plaintiff caused by the insurer's misconduct . . . (Tr. 1435-36).

Prior to the giving of this instruction, Homestead had objected to the inclusion of emotional distress as a damage element (Tr. 1322-24). During discussions regarding

the proposed jury instructions, the court had acknowledged there was insufficient evidence to support a claim of damages due to emotional distress. The trial court commented that he had heard no evidence of mental distress (Tr. 1289). This comment was quite correct.

Counsel for plaintiff had attempted to elicit testimony from the plaintiff regarding emotional distress, but plaintiff did not provide any testimony as to impaired function, depression, or a debilitating mental condition. Mr. Zoppo's sole testimony to support damages for emotional distress was as follows:

> Q. The last three years, up until this trial started, have you thought about the insurance company's actions?
>
> A. I think about it all the time.
>
> Q. How has it affected you, Don?
>
> A. It affected me a lot.
>
> Q. Well, you got to tell the jury, Don. They can't read your mind.
>
> A. Well, that was everything I had, and I got it all torn down and everything for something I didn't do. (Tr. 710-711)

This testimony is insufficient to establish emotional distress even if emotional distress was an element of damages for a bad faith claim. Nevertheless, counsel for appellant argued that Mr. Zoppo's testimony allowed the jury to *infer* that some emotional distress had occurred.

The jury was instructed to calculate damages due to emotional distress based upon a possible inference of such distress. No psychologist, friend or relative testified

regarding any change in Mr. Zoppo's demeanor; any symptoms of severe or debilitating dysfunction; or regarding any other possible evidence that Mr. Zoppo was unable to cope with serious mental distress. *See Paugh v. Hanks,* 6 Ohio St. 3d 72 (1983); *Yeager v. Local Union 20,* 6 Ohio St. 3d 369 (1983). Mr. Zoppo could not recover for emotional distress under any standard promulgated by this Court in any context. There is no logic in fashioning a special emotional distress rule specifically for bad faith claims.

Appellant was awarded attorney fees at the trial of this matter, but the charge to the jury properly permitted an award of attorney fees only if the jury first awarded punitive damages. The charge to the jury was:

> [I]f you find that plaintiff is entitled to punitive damages, then and only then you may, but are not required to include plaintiff's financial attorney fees as part of the compensatory damages award, in plaintiff's bad faith claim. Vol. III, p. 1437.

Appellants challenge this limitation and suggest that attorney fees should as an item of damage for bad faith without the preliminary determination that punitive damages should be awarded.

The *Digital* decision once again is controlling on this issue. In *Digital & Analog Design Corp. v. North Supply Co.,* 63 Ohio St. 3d 657, 662 (1992) this Court wrote:

> [T]he requirement that a party pay attorney fees under these circumstances is a punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages. There is no separate tort action at law

> for the recovery of attorney fees under these circumstances. *Without a finding of malice and the award of punitive damages, plaintiff cannot justify the award of attorney fees,* unless there is a basis for sanctions under Civ.R. 11 . . .
>
> In view of our determination that *attorney fees are punitive in nature,* we find it wholly appropriate to treat attorney fees in the same manner as punitive damages with respect to whether such an issue is to be presented to a jury. (Emphasis added.)

The attorneys' fees incurred in prosecuting bad faith claims are no different than the attorneys' fees occurred in any other tort. If attorneys' fees are awarded only for purposes of punishment in every tort other than a claim for bad faith, there is no logical reason to create a special rule for one particular tort.

IV. CONCLUSION

This Court must keep in mind that the Court of Appeals' decision on appeal did not address the substance of all of the assignments of error raised by Homestead in its appeal. After concluding that the trial court erred in denying Homestead's motions for directed verdict, the Court of Appeals concluded that the Homestead's remaining assignments of error were moot.

The remaining assignments of error will remain moot if this Court reaffirms the rule of law stated in *Said* and affirms the judgment of the Court of Appeals. A modification of *Said,* however, does not lead to the conclusion that the trial court's judgment in favor of appellant must be reinstated. The evidence adduced at trial will need to

be re-examined in the context of this Court's decision, and Homestead's remaining assignments of error may need to be considered on their merits. If the judgment of the Court of Appeals is not affirmed, the case will need to be remanded for further proceedings consistent with this Court's opinion.

Defendant-appellee Homestead Insurance Company respectfully submits that the judgment of the Court of Appeals should be affirmed. More specifically, the rule of law expressed in *Motorists Mutual v. Said* should be followed and endorsed by this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed this 18 day of March, 1994, to Robert P. Rutter, Attorney for Plaintiffs-Appellants, 6200 Rockside Road, Suite 200, Independence, Ohio 44131.

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